No. 11530

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HERMAN HAYMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

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APPELLANT'S OPENING BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

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APPELLANT'S OPENING BRIEF.

To the Honorable Ninth Circuit Court of Appeals of the United States of America:

This is an appeal from the District Court of the United States, Southern Dstrict of California, Central Division, of a conviction of the Appellant in six counts of an Information charging the defendant in count one with violation of U. S. C., Title 18, Sec. 78, to-wit, falsely personating a true and lawful holder of a debt of, and due from, the United States; in Count Two with violation of U. S. C., Title 18, Sec. 63, to-wit, falsely making, forging, and counterfeiting, and causing and procuring to be falsely made, forged and counterfeited a certain endorsement on a check; in Count Three with violation of U. S. C., Title 18, Sec. 73, to-wit, uttering and publishinig as true, and causing to be uttered and published as true, a false, forged and counterfeit signa-

ture on a check; in Count Four with violation of U. S. C., Title 18, Sec. 73, to-wit, forgery; in Count Five with violation of U. S. C., Title 18, Sec. 73, to-wit, uttering and publishing as true, and causing to be uttered and published as true, a false, forged and counterfeit signature on a check and in Count Six with violation of U. S. C., Title 18, Sec. 88, to-wit, conspiracy.

Jurisdiction.

The Jurisdiction of this Court is conferred by U. S. C., Title 18, Secs. 73, 78, and 88.

On November 20, 1946, the Grand Jury returned an indictment against defendant in six counts.

Count One of the indictment charges a personation by falsely personating to be the true and lawful holder of a Government obligation: to-wit, a Treasury check in the sum of $100.00. Count Two of the indictment charges the forging or the causing to be forged of a material fact, the signature. Count Three of the indictment charges the utterance of the same check. The first three counts refer to a single check. Count Four of the indictment charges forgery of a second check.

Count Five of the indictment charges uttering the second check and Count Six charges conspiracy in forging and uttering the second check.

The Defendant plead not guilty and waived a trial by jury. The Defendant was found guilty on all counts and judgment was pronounced against Defendant on January 20, 1947, by the Honorable Judge William C. Mathis. Notice of Appeal was duly and regularly filed on January 27, 1947.

Statement of Facts.

This case was tried to the Court on the pleadings and on oral and documentary evidence submitted by the parties. The basic facts may be summarized as follows:

JUANITA JACKSON had known the Defendant about seven years. The Defendant owned an automobile and the witness would ride around with him and steal checks from mail boxes [R. 39]. The Defendant did not put the payee's name on the back of the check, but at times the Jackson girl did [R. 40]. She would take the check to wherever the Defendant saw fit and then she would sign the check and cash it. They had identification cards and the witness would fill her name in for the purpose of getting the checks cashed. None of the checks ever came to her endorsed [R. 42]. They would cash the checks usually at liquor stores. Sometimes the witness Jackson would use operator's license for identification in getting the checks cashed. The witness Jackson would cash the checks [R. 55].

DOROTHY MCCLAIN drove around with Appellant taking checks out of mail boxes [R. 70]. The witness McClain would put the payee's name on the checks then cash them [R. 71]. The witness McClain would place her hand writing on the identification cards to get the checks cashed [R. 22-72]. The witness McClain placed the endorsement on the check of Lieutenant Charles A. Wilburn [R. 73; Government's Exhibt 2, R. 23].

PAUL CHESTER REDD endorsed the check contained in Counts One, Two and Three of the indictment made out to Samuel T. Thompson [R. 95; Government's Exhibt 4, R. 24]. Redd also endorsed other checks [R. 96]. The checks were handed to Redd, together with a slip of paper and he would endorse the checks according to the slip of paper. He did not know who had written the name on the slip of paper [R. 101].

JOHN H. MARTIN conducted a liquor store at Sixty-second and San Pedro Streets. The Defendant came into his store and cashed the Samuel T. Thompson check and stated he was Samuel T. Thompson and that the check was his [R. 111]. The check was not endorsed in his presence [R. 112].

SAMUEL T. THOMPSON had never given anyone permission to cash his checks [R. 34]. Nor did he receive any of the proceeds.

CHARLES A. WILBURN had never given anyone permission to cash his check and had neither received any of the proceeds [R. 36].

Despite the evidence offered by the prosecution the Defendant denied that he took any checks from mail boxes or that he drove anyone around to steal checks [R. 126].

Statement of Points to Be Urged.

1. The evidence in its entirety is insufficient to support the judgment of conviction.

2. The evidence is insufficient to show that the offenses were committed within six years before the filing of the indictment.

3. The evidence is insufficient to show that Appellant personated a lawful holder of a debt of the United States.

4. The evidence is insufficient to show that a conspiracy was entered into.

Summary of Argument.

Herman Hayman was convicted upon the testimony of Juanita Jackson, Dorothy McClain and Paul Redd that he forged or caused to be forged the checks set forth in the indictment. These witnesses were clearly accomplices and their testimony lacked the necessary corroboration necessary to sustain a conviction.

In Counts Two and Four, Appellant was charged with forgery, although Dorothy McClain and Paul Redd admitted they were the ones who endorsed the checks.

Although certain dates are laid in the indictment as to the occurrence of the acts the record is absolutely devoid of any evidence tending to show that the alleged crimes took place within the period of the statute of limitations.

ARGUMENT.

I.

Insufficiency of the Evidence to Sustain the Judgment of Conviction.

We emphatically assert that the evidence herein in its entirety is legally insufficient to support the judgment of conviction and should therefore be reversed.

We shall attempt to analyze the evidence on each Count in the manner in which they appear in the indictment.

COUNT I charges the Defendant with personating one Samuel T. Thompson, a true and lawful holder of a debt, due from the United States.

The evidence shows that Defendant entered a liquor store at Sixty-second and San Pedro Streets in Los Angeles and purchased some liquor. He passed a check made payable to Samuel T. Thompson and told the liquor dealer that he was Samuel T. Thompson and the check was his musteringout pay. The check was cashed [R. 110-111].

It will be noted as to this Count no date or time is shown as to when Appellant entered this store and cashed the check.

Offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and indictable under any existing statutes, the period of limitation shall be six years.

U. S. C., Title 18, Sec. 582.

In *People v. James,* 59 Cal. App. (2d) 125, the court said:

> "The principal point made on appeal is that the evidence is insufficient to show that the offense was committed within three years before the filing of the information, this being the statutory period of limitation for prosecutions of this offense. (Penal Code, Sec. 800.) This contention must be sustained. The information was filed December 26, 1941, and alleged that the offense charged was committed on December 13, 1941. The Defendant's plea of not guilty put in issue this allegation of the information (citing cases), and while the People were not required to prove the date exactly as alleged, the burden was on them of showing that the offense occurred within the period of limitation. (Citing cases.)"

The Court further held that dates shown on the exhibits could not be used to establish the date and time of the offense.

In *Charters v. United States,* 289 Fed. 63, in a prosecution for violating the banking laws, evidence that the items alleged to have been embezzled by Defendant were accomplished by endorsements on a depositor's time certificate, all the transactions being more than three years prior to the date of the return of the indictment, it was held to show conclusively that the prosecution was barred by limitations.

In the instant case there is no evidence tending to prove that the defendant committed the crime charged in Count One within six years prior to the filing of the indictment.

COUNT II charges the Defendant with forging the Samuel T. Thompson check [Government's Exhibit 4, R. 25]. Paul Redd testified that he forged the name of Samuel T. Thompson on the check [R. 95].

This testimony clearly established Redd as an accomplice.

A conviction cannot be had upon the testimony of an accomplice unless it be corroborated.

People v. Jones, 87 Cal. App. 482.

An accomplice is an associate in the commission of a crime, and is one who unites in the commission of the crime, and he must be one who is liable to prosecution for the identical offense charged against the defendant.

People v. Frahm, 107 Cal. App. 253.

Clearly the testimony of Redd was that of an accomplice. In determining the question of corroboration the testimony of the accomplice must be eliminated from the case.

People v. Hobson, 7 Cal. App. (2d) 392.

There is not one iota of evidence in the record to support the contention of the prosecution that the Defendant procured the witness Redd to sign the signature of Samuel T. Thompson to the check mentioned in Count Two.

Also it might be pointed out that no date is shown when Defendant asked the witness Redd to sign the check, to bring the crime within the statute of limitations as heretofore argued.

COUNT III charges the Defendant with uttering and publishing the Samuel T. Thompson check.

This conviction is based upon the testimony of Jackson H. Martin [R. 110-111].

The indictment charges that on or about March 26, 1946, Defendant uttered and published the check. Since no date is mentioned as to when the alleged crime was committed, the evidence fails to establish that it was committed within the statute of limitations and the argument urged in support of the insufficiency of the evidence under Count I is incorporated herein.

COUNT IV of the indictment charges defendant with the forgery of the Wilburn check [Government's Exhibit 2, R. 23].

Dorothy McClain admitted that she signed this check [R. 73]. This testimony clearly established her as an accomplice and her testimony standing alone is insufficient to sustain the conviction. We submit that there is no corroboration. S. Kendall Gibson testified that Dorothy McClaim cashed the check and endorsed her signature thereon [R. 118]. Based on the foregoing evidence we cannot conceive how or in what manner it establishes that Defendant is guilty of the crime charged.

The evidence merely showed that Defendant accompanied Dorothy McClain to the store and tried on a pair of shoes.

The corroborating evidence required to convict a Defendant, in addition to that of an accomplice, is not sufficient if it merely tends to raise a suspicion of the guilt of the accused.

People v. Lee, 81 Cal. App. 49.

Corroboration of an accomplice's testimony is not sufficient if it merely shows commission of the offense or circumstances thereof.

People v. Baker, 25 Cal. App. (2d) 1.

Again we might point out that no date is shown when this alleged occurrence took place. The witness S. Kendall Gibson merely testified that in March, 1946, he was employed at the Goodwin Shoe Store in Hollywood. There is no evidence to show that the forgery took place on that date or some other time. There is no evidence as to when the witness Dorothy McClain and Defendant were in the store. No witness was produced to show what relation, if any, the date that the witness Gibson was employed in the shoe store bore to the time that the check was endorsed. The record is devoid of any evidence as to the date the Defendant and Dorothy McClain entered the store [R. 116].

COUNT V related to the uttering and passing of the Wilburn check and the same argument used in support of Count IV may here be used.

COUNT VI of the indictment charges conspiracy to forge and publish and utter checks.

The indictment charges that the overt acts were committed on or about March 26, 1946. Again we submit that there is no evidence to establish the date of the alleged overt act and the evidence is insufficient to prove that the offense was committed within the statute of limitation.

The evidence merely shows that S. Kendall Gibson, by whom the prosecution sought to establish the overt acts, was employed at Goodwin Shoe Store in March, 1946.

The date that the Defendant and the McClain girl entered the store is not shown [R. 116].

U. S. C., Title 18, Sec. 582 is applicable to offenses described in *U. S. C., Title 18, Sec. 88.*

Green v. United States, 154 Fed. 401;
Brown v. Elliott, 225 U. S. 392.

To warrant conviction of conspiracy under this section, the overt act charged in the indictment must be proved.

Fredericks v. United States, 292 Fed. 856.

Proof of the overt act, in addition to fact of conspiracy is essential to a valid conviction.

Weinstein v. United States, 11 F. (2d) 505.

The overt acts must be proved as laid.

United States v. Ault, 263 Fed. 800.

Proof of the formation by Defendant and others more than three years before the indictment of such a conspiracy as that charged in the indictment and of an overt act thereunder prior to the three years is insufficient to sustain the charge of conspiracy within the three years.

Ware v. United States, 154 Fed. 577.

The burden of proof is on the prosecution to show that the offense occurred within the period of limitation.

People v. James, 59 Cal. App. (2d) 121.

Conclusion.

For the foregoing reasons we respectfully submit that the judgments herein should be reversed.

Respectfully submitted,

Walter L. Gordon, Jr.,
Attorney for Appellant.